



March 14, 2014

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Connect America Fund, WC Docket No. 10-90;
High-Cost Universal Service Support, WC Docket No. 05-337

Dear Ms. Dortch:

In the 2011 *USF/ICC Transformation Order* that created the Connect America Fund (CAF) reforming traditional universal service to support delivering modern voice and broadband network services to the vast swaths of rural America served by price cap companies, the Commission raised the question of how best to similarly modernize the eligible telecommunications carrier (ETC) designation process.¹ Under the statute, a company must be an ETC in order to receive support.² The Commission noted that the CAF program will replace broad legacy support programs with very targeted CAF support, reducing or eliminating support in some areas and creating a potential mismatch between CAF support and legacy ETC obligations. The Commission sought comment on how to “match obligations and funding” under the new program and whether “some adjustment in affected ETCs’ section 214(e) obligation to offer service “throughout [their] service area may be appropriate.”³

The attached legal paper, which builds on previous submissions,⁴ sets out a path for the Commission to modernize the ETC designation process to bring it in line with statutory requirements and the goals of the CAF program. As legacy funding is replaced with the new CAF Phase II, the Commission’s aim “to ensure that obligations and funding are appropriately matched, while avoiding consumer disruption in access to communications services” requires reform of the ETC process.⁵ The Commission took steps recently to do so to provide for a more

¹ Connect American Fund et al., WC Docket Nos. 10-90 et al., 26 FCC Rcd 17633 (2011) (*USF/ICC Transformation Order*) at ¶¶ 1089-1102

² 47 U.S.C. 254(e)

³ *USF/ICC Transformation Order* at ¶¶ 1089, 1096.

⁴ See, e.g., Comments of USTelecom Association, GN Docket No. 09-51 et al., at 17 (filed July 12, 2010); ABC Plan Joint Letter, Attach I at 13; as well as comments in response to FNPRM.

⁵ *USF/ICC Transformation Order* at ¶ 1089.

successful Mobility Fund. Doing so for the CAF program soon is equally necessary. This effort must be completed shortly in order to meet the Commission's commitment to implementing CAF Phase II in 2014.

Companies must qualify as "eligible telecommunications carriers" or ETCs in order to participate in the Commission's programs to support delivering communications services to rural areas. Generally, state commissions designate carriers as ETCs according to statutory criteria and define the geographic area that the designation includes. Despite guidance from the Joint Board and the Commission that the geographic area where these obligations exist should be drawn to accurately reflect areas where high-cost support should be targeted, state commissions generally have designated price cap carriers as ETCs everywhere they serve within a state. While this approach may have been workable in the past when substantial implicit subsidies were available to supplement explicit legacy support for delivering service in uneconomic areas, this is no longer the case. The Commission will be eliminating legacy explicit support to price cap carriers and implicit subsidies have long since been competed away. And, any argument that broad geographic ETC obligations can be justified due to some form of remaining implicit subsidies is at tension with Congress's mandate that the Commission's universal service program replace implicit subsidies with explicit ones.

The CAF Phase II program will implement a key universal service reform principle by replacing legacy support with support targeted to narrow, clearly defined areas – particular census blocks in this case. No CAF Phase II subsidies will be available outside these areas and legacy support will end. Thus, the legacy practice of imposing ETC obligations broadly would impose regulatory mandates to offer service in areas that receive no federal universal service support. Last year, the Commission recognized the importance of narrowing the geographic scope of ETC obligations in order to make its efforts to expand wireless coverage through the Mobility Fund effective, explaining that failing to do so would "discourage" participation in the fund.⁶

The attached paper proposes that, in order to conform the ETC process to the Commission's plans to replace legacy support with geographically targeted CAF Phase II support and to increase likely participation in the CAF Phase II program, the Commission undertake a series of steps to match CAF Phase II support and ETC obligations. In particular, the Commission should sunset current price cap company ETC designations and create a new CAF Phase II ETC designation, open to any eligible company.⁷ That designation would define the geographic area in which ETC obligations apply as being the same area in which CAF Phase

⁶ *Mobility Fund Order* at ¶ 15.

⁷ The Commission should similarly institute a process for separate, program specific ETC designations. For example, Lifeline ETC status should be de-linked from status regarding other programs such as CAF Phase II or the Mobility Fund. *See USF/ICC Transformation Order* at ¶ 1102

II funding is provided.⁸ Narrowing the ETC designation would allow companies receiving CAF Phase II support to focus on the challenging task of providing reliable voice and broadband services to the areas identified by the model as having no private sector business case to support modern broadband networks. Areas outside the CAF Phase II supported census blocks are generally less challenging to serve, and typically have a variety of cable, fixed wireless and mobile alternatives, as well as access to other Commission programs including the Remote Areas Fund. Finally, the paper notes that federal and state processes for carriers to pursue to discontinue providing services are not addressed in the paper and would be unaffected by the proposed ETC reforms, providing a further backstop to avoid potential consumer disruption from modernizing the ETC process.

We look forward to continuing to work with the Commission to ensure that the Connect America Fund is an efficient and effective vehicle for keeping rural America connected to modern voice and broadband networks.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Jonathan Banks".

Jonathan Banks
Senior Vice President
Law & Policy

cc: Carol Matthey
Alexander Minard

⁸ The ETC designation could be conditional until qualification for, or receipt of, CAF Phase II funding.

Modernizing the Eligible Telecommunications Carrier Designation

In the FNPRM that accompanied the *USF/ICC Transformation Order*, the FCC sought comment on how to modify the Eligible Telecommunications Carrier (ETC) rules to be consistent with the far-reaching reforms it had just adopted by creating the Connect America Fund to support modern voice and broadband networks in the rural parts of the country served by price cap communications companies. The record is complete and with CAF Phase II poised to launch this year, it is time to complete the modernization of high-cost support in areas served by price cap companies by conforming the ETC rules to the already-adopted CAF reforms and to the requirements of sections 214 and 254 of the Communications Act.

Congress created the ETC designation in the Telecommunications Act of 1996 (1996 Act) as part of that Act's universal service reforms. The lynchpin of those reforms was to replace the web of implicit subsidies on which federal and state regulators previously had relied to fund universal service. The 1996 Act opened all telecommunications markets to competition, altering the social compact under which incumbent carriers were granted a monopoly franchise and certain implicit subsidies in return for their commitment to offer service in their franchise area at just and reasonable rates. Congress recognized that those implicit subsidies no longer would be sustainable in competitive markets, and therefore established a new social compact under which carriers would receive explicit federal universal service support to provide universal service in particular high-cost areas or for particular purposes (such as Lifeline or discounted service to schools and libraries). It further required the Commission, working with the states, to implement that compact by designating common carriers eligible to receive explicit federal support to provide the services supported by the new federal universal service mechanisms

throughout particular areas under new section 214(e).¹ Simply put, ETC designations were intended to be a means of identifying participants in the federal universal service support mechanisms.

Over the years, the Commission has determined that the service supported by the federal universal service high-cost and low-income support mechanisms is voice telephony service. It also concluded that, as a condition of receiving high-cost support, an ETC must make available voice telephony service on a standalone basis throughout its ETC service area.² Additionally, it required all ETCs to participate in the Commission's Lifeline program.³ ETCs designated by state commissions also may be subject to state-specific ETC requirements.

Previous Commission and state commission interpretations of section 214(e) have imposed significant costs on carriers that are ETCs, particularly price cap carriers, whose ETC service areas mirror their large study areas. According to the Commission's current ETC requirements, a price cap carrier that receives some amount of high-cost support, however small and targeted to a specific geographic area, or no support at all, must offer standalone voice telephony service throughout its entire study area. This includes, for example, new developments or multi-dwelling units where the developer has entered into an exclusive marketing arrangement with some other provider. ETCs also must offer Lifeline-discounted service in such areas. Requiring ETCs to offer a service – standalone voice service – that a

¹ See 47 U.S.C. §§ 254(e), 214(e). As discussed below, Congress exempted the Commission's preexisting Lifeline program from the requirements in section 254, including the requirement in section 254(e) that only ETCs may receive federal universal service support.

² See *USF/ICC Transformation Order* at ¶ 80.

³ See 47 C.F.R. § 54.405(a).

dwindling number of consumers purchase⁴ causes these carriers to spend resources that are better spent furthering the Commission's refocused universal service objectives.

ETC reform is essential to successfully implement the CAF and achieve the Commission's ambitious broadband deployment goals in areas served by price cap carriers. It makes no sense to continue maintaining price cap carriers' legacy ETC designations that were made more than fifteen years ago and ETC obligations that were designed to implement explicit legacy high-cost support mechanisms that soon will be phased out and implicit support schemes that competition has long since eroded. Those designations and obligations increase costs by forcing providers to design products and services to meet obsolete regulatory requirements, rather than consumer demand. Indeed, these legacy ETC requirements not only discourage private investment needed to close the gap between served and unserved areas, they will also deter participation in CAF Phase II by service providers that are unable to economically perform legacy ETC duties in addition to the obligations associated with the new CAF Phase II support. Thus, maintaining these legacy ETC requirements on price cap carriers all but ensures that the Commission either will be unable to adequately achieve its CAF objectives or will have to devote significantly more resources to do so. By eliminating these legacy ETC designations and requirements, the Commission will enable price cap carriers and other legacy ETCs to focus limited capital resources to extend broadband to additional areas, rather than wasting them on rapidly obsolescing facilities and services.

Eliminating legacy ETC designations and obligations in areas served by price cap carriers not only makes policy sense, it also is required by the statute. Section 214(e)(1) of the

⁴ USTelecom estimates that at the end of 2012 only 31% of US households were purchasing traditional switched phone service from an incumbent local exchange carrier. Most of these households also had one or more members with mobile phone service. See <http://ustelecom.org/broadband-industry/broadband-industry-stats/residential-competition>.

Communications Act of 1934, as amended (Act), provides that an ETC “shall be eligible to receive universal service support in accordance with section 254,” and “shall, throughout the service area for which such designation is received . . . offer the services *that are supported* by Federal universal service support mechanisms under section 254(c).”⁵ Under the Commission’s current interpretation of that provision, a provider may be designated as an ETC and bear ETC obligations regardless of whether it *actually receives* any support from the legacy high-cost funding mechanisms on the theory that it is nonetheless “eligible” to receive such support.⁶ That approach may have been defensible under the pre-*USF/ICC Transformation Order* regime and funding mechanisms insofar as multiple carriers could be designated as ETCs in the same geographic area. But the Commission cannot reconcile this existing interpretation with the statute once the Commission implements CAF Phase II.

Under the new CAF Phase II funding mechanism, providers will be eligible to receive high-cost support only in certain, Commission-identified geographic areas, and are obligated to comply with the CAF Phase II service obligations only in such areas.⁷ In addition, if one provider receives CAF Phase II support in a specific geographic area, no other provider will be eligible to receive CAF Phase II support in such area.⁸ And, any such support is time limited.⁹

⁵ 47 U.S.C. § 214(e)(1) (emphasis added).

⁶ See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carrier*, 23 FCC Rcd 8834, ¶ 29 (2008) (*CETC Interim Cap Order*).

⁷ See *USF/ICC Transformation Order* at ¶¶ 167-70 (explaining that CAF Phase II support will not be available in census blocks where there is an unsubsidized broadband competitor providing service or in census blocks where the modeled cost of providing service is beneath the Commission’s high-cost benchmark); 47 C.F.R. § 54.313(e)(2) (CAF Phase II recipient must certify that it is providing broadband service to 100% of its supported locations).

⁸ See generally *USF/ICC Transformation Order* at ¶¶ 164-66.

⁹ *Id.* at ¶¶ 160, 1197.

In this context, continuing to apply legacy ETC designation and obligations to providers operating in price cap carriers' service territories in areas where they do not receive – and have no opportunity to receive – high-cost support would be flatly inconsistent with the requirements of sections 214 and 254 of the Act. Accordingly, the Commission should reinterpret those provisions to limit the ETC designations of providers operating in price cap carriers' service territories only to those areas where such providers *elect to actually receive funding* under one of the Commission's universal service support mechanisms, and limit their obligations only to the specific requirements established for such mechanism(s) when the ETC designation is granted.¹⁰ Specifically, and as discussed below, the Commission should:

- find that, going forward, any ETC designation in price cap carrier service areas must be limited only to those areas where a provider has been awarded support and only to the provider that actually receives support for such areas;
- sunset all existing price cap carrier ETC designations (and eliminate any associated ETC obligations) when the Commission implements CAF Phase II, provided that a price cap company may elect to retain ETC status to the extent that any legacy high-cost support mechanisms remain in place for a transitional period;
- require that ETC designations (and obligations) in price cap carrier service areas must be limited to the specific support mechanism under which a provider is receiving support (*e.g.*, CAF Phase II ETC, Mobility Fund Phase II ETC) and for the specific term for which funding is available; and
- de-link Lifeline participation from a high-cost ETC designation by establishing a voluntary Lifeline-only designation.

The reforms that USTelecom sets out in this paper are designed to match the statutory requirements of sections 214 and 254 of the Act and the policy goals of the CAF II program. Consistent with the purpose of the section 214(e) ETC designation process, the ETC process should identify entities that participate in the federal universal service support mechanisms and

¹⁰ The Commission previously sought comment on these ETC reform proposals so there is no procedural impediment to the Commission promptly adopting such reforms. *See USF/ICC Transformation Further Notice* at ¶¶ 1089-1102; *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, WC Docket 10-90, DA 11-1348 (rel. Aug. 3, 2011) (seeking comment on the ABC Plan).

obligate those entities to provide specific services in the specific areas where those entities receive sufficient support. Because the focus of this paper is ETC modernization, it does not discuss service discontinuance procedures or the parts of section 214 that are concerned with issues other than the designation of ETCs. To the extent required, there are separate federal and state processes for carriers to pursue to discontinue providing telecommunications services. Those processes are not addressed in this paper and would be unaffected by the reforms to the ETC designation process discussed in this paper.

I. The Commission Should Act Now to Limit ETC Designations in Price Cap Carrier Service Areas to Funded Locations and Funded Providers.

Members of USTelecom have consistently pressed the Commission to complete comprehensive ETC reform to ensure that its new CAF rules and support mechanism comply with the requirements of sections 214 and 254 of the Act. Specifically, USTelecom's members called upon the Commission to sunset any existing ETC designations and obligations for price cap carriers once its legacy high-cost support mechanisms for such carriers expire or carriers elect to forgo such support, provide for the designation of new ETCs in areas eligible for CAF funding, and limit such designations and associated obligations only to those locations and providers that actually receive such funding.¹¹ Once the new CAF Phase II funding mechanism is implemented, the Commission cannot lawfully or, indeed, sensibly maintain its existing interpretation of section 214 and ETC rules. The Commission already has a complete record on these issues, and thus should implement these essential reforms without any further delay.

¹¹ Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al., Attach. 1 at 13 & Attach. 5 at 53-58 (filed July 29, 2011) (ABC Plan); USTelecom Petition for Reconsideration, WC Docket No. 10-90 at 11-12 (filed December 29, 2011).

Section 214(e)(1) of the Act provides that each ETC “shall be eligible to receive universal service support in accordance with section 254,” and “shall, throughout the service area for which such designation is received . . . offer the services *that are supported* by Federal universal service support mechanisms under section 254(c).¹² Over fifteen years ago, the Commission and the Federal-State Joint Board on Universal Service (Joint Board) cautioned that state commissions should *not* award ETC designations covering a price cap carrier’s entire study area, but rather should establish sufficiently small service areas for such designations to accurately target high-cost support where it was needed.¹³ However, state commissions did just that and designated price cap carriers as ETCs for their entire study areas (*i.e.*, throughout their service territories).

Notwithstanding the states’ establishment of over-broad ETC designations for price cap carriers, the Commission interpreted section 214(e) to require ETCs to offer legacy telecommunications services throughout their service territories within a state.¹⁴ And, worse yet, it established high-cost support funding mechanisms that resulted in funding being directed to price cap carriers in very few states forcing them, instead, to rely on rapidly eroding implicit subsidies to cover the cost of serving rural and other high-cost areas. As a consequence, price cap ETCs have been (and continue to be) required to offer legacy services irrespective of whether they actually receive any federal high-cost support to do so. The Commission justified

¹² 47 U.S.C. § 214(e)(1) (emphasis added).

¹³ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 184 (1997) (*First Universal Service Order*) (“Specifically, we conclude that service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.”); *id.* at ¶ 185 (concurring with the Joint Board that “a state’s adoption of unreasonably large service areas might even violate several provisions of the Act”); *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶¶ 176-77 (1996).

¹⁴ *First Universal Service Order* at ¶ 141.

this approach as being consistent with section 214(e)(1) because – even if the ETC did not receive support – it was nonetheless *eligible* for support.¹⁵ That is, under the Commission’s old rules, the ETC was not categorically barred from receiving support. And, moreover, the ETC was free to use any support it did receive to provide the supported service (voice telephony) anywhere in its service territory in a given state.

The new CAF Phase II support mechanism fundamentally changes the universal service-ETC dynamic. Under the Commission’s new rules, CAF Phase II high-cost support is directed only to specific Commission-identified areas, and shall be used to deploy and offer voice and broadband service only in those areas. In addition, only one provider in a price cap carrier service territory will qualify for CAF Phase II support in a specific geographic area; no other provider (including an ILEC previously designated as an ETC for that area) may receive support in such area.¹⁶ Thus, absent further Commission action, once CAF Phase II is implemented, no ETC can offer “services *that are supported* by Federal universal service support mechanisms”¹⁷ in the large swaths of geography in price cap carrier service areas that are not targeted and eligible for CAF Phase II support. And, even in the limited areas where CAF Phase II funding will be available, many existing so-called “eligible telecommunications carriers” (that is, those designated as ETCs under the Commission’s legacy USF support mechanisms) will become, in fact, *ineligible* to receive high-cost support when the CAF Phase II funding mechanism is implemented and funding is awarded to another provider. These results cannot be squared with the plain language of the statute, and the Commission thus would violate section 214 of the Act

¹⁵ *CETC Interim Cap Order* at ¶ 29.

¹⁶ *USF/ICC Transformation Order* at ¶¶ 164-66.

¹⁷ 47 U.S.C. § 214(e)(1)(A).

if it maintains legacy ETC service designations and obligations for such carriers following implementation of CAF Phase II.

Requiring an unsupported legacy ETC to offer service in competition with a CAF Phase II recipient would violate the Commission’s “competitive neutrality” principle, which requires that its universal service policies “be competitively neutral . . . [and] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”¹⁸ It also would violate section 254’s mandate that the Commission’s universal service policies be “equitable and nondiscriminatory.”¹⁹

Limiting the ETC designations and obligations of providers operating in price cap carriers’ service areas only to those providers and areas where such providers elect to receive support not only is statutorily required, but also is consistent with sound public policy. Once the new CAF Phase II funding mechanism is implemented, many existing ETCs will lose universal service support provided under the Commission’s legacy high-cost support mechanisms²⁰ – support on which they relied to provide service to high-cost areas ineligible for support under CAF Phase II. Simply put, the Commission cannot reasonably require such carriers to continue providing service as a regulatory mandate after it withdraws such legacy support. Any such requirement would run afoul of section 254, which requires the Commission to design its universal service support program so that support is “sufficient” to enable ETCs to offer the services deemed “universal.”²¹

¹⁸ *First Universal Service Order* at ¶¶ 43-55.

¹⁹ 47 U.S.C. § 254(b)(4), (d) and (f).

²⁰ *USF/ICC Transformation Order* at ¶ 180.

²¹ 47 U.S.C. § 254(b)(5), (e) and (f).

The Commission already addressed this issue to some degree in its Mobility Fund Phase I proceeding. There, the Commission concluded that it should forbear from the requirement in section 214(e)(5) that the service area of an ETC should conform to the service area of any rural telephone company serving the same area, and allow wireless carriers to file Mobility Fund Phase I ETC applications conditioned on actually receiving Mobility Fund Phase I support.²² In so holding, the Commission determined that, “[a]bsent forbearance, . . . parties seeking support may be required to take on *unsupported ETC obligations* in portions of rural carriers’ study areas – areas that may not be eligible for support or for which they may not win support”²³ Finding that such an outcome was unacceptable, the Commission forbore from section 214(e)(5). It determined that “assuring that obligations of new ETCs will not extend to portions of rural service areas for which a new ETC may not receive support” will “reduce the cost of auction participation, encourage lower bids, and improve auction outcomes.”²⁴

Importantly, the Commission concluded that its action in the Mobility Fund Phase I proceeding to enable “new ETC service areas to be defined in a more targeted manner” was “consistent with [its] approach of targeting support to areas with a specific need for the support.”²⁵ Indeed, “[t]o require Mobility Fund Phase I support recipients to serve a wider area

²² See *Connect America Fund*, WC Docket 10-90 et al., Second Report and Order, 27 FCC Rcd 7856 (2012) (*Mobility Fund Phase I ETC Forbearance Order*).

²³ *Id.* at ¶ 15 (emphasis added).

²⁴ *Id.*

²⁵ *Id.* at ¶ 16 (also finding that this approach “helps preserve these efficiencies, and thus serves the public interest”).

runs counter to the Commission's recent and ongoing efforts to serve the public interest by focusing USF resources on defined areas of need."²⁶

The same result is compelled here. For the reasons set forth in its *Mobility Fund Phase I ETC Forbearance Order* and herein, USTelecom urges the Commission to limit ETC designations in price cap carrier areas to funded locations and actual CAF Phase II recipients.²⁷

II. The Commission Should Eliminate Legacy ETC Designations in Price Cap Carrier Service Areas

The Commission not only should limit high-cost support ETC designations and obligations to those carriers and particular areas that are awarded CAF Phase II funding but also should declare all existing ETC designations (and corresponding obligations) in price cap carriers' service territories null and void when the CAF Phase II support mechanism is implemented. To the extent the Commission maintains the legacy high-cost support mechanisms in particular areas served by price cap carriers beyond CAF Phase II implementation, price cap carriers should be allowed to elect whether to retain their ETC designations in those areas where they elect to continue receiving legacy support.

In particular, the Commission should declare that the existing ETC designations in price cap carrier service areas were tied to the existing high-cost support mechanisms, and declare that those designations sunset by operation of law when a carrier no longer receives support under those mechanisms. Such a declaration is consistent with the plain language of section 214(e)(1),

²⁶ *Id.*

²⁷ As discussed below, the Commission plainly has authority to interpret the text of section 214(e), and to the extent that the statutory language is ambiguous, the courts likewise must defer to the Commission's interpretation of section 214. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-86 (1999). With respect to section 214 in particular, the Tenth Circuit has noted that "[t]he FCC's interpretation of the Telecommunications Act's provisions addressing state ETC designations is, of course, subject to deference." *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007).

which provides for the designation of a carrier as an ETC in order to make such carrier “eligible to receive universal service support in accordance with section 254” and requires such carrier to offer “throughout the service area for which the designation is received . . . the services that are supported by Federal *universal service support mechanisms* under section 254(c).”²⁸ It also is consistent with section 214(e)(5), which defines the term “service area” to be “a geographic area established . . . for the purpose of determining universal service obligations and *support mechanisms*.”²⁹ The statute itself thus expressly ties ETC designations to the Commission’s universal service support mechanisms, which means that any ETC designation adopted for purposes of one support mechanism should expire when the Commission sunsets that mechanism.

Accordingly, the Commission should declare that: (1) ETC designations and their concomitant obligations (including any existing ETC designations adopted by the Commission or the states for purposes of the Commission’s legacy high-cost support mechanisms) are tied to particular support mechanisms and, thus, sunset by operation of law when carriers no longer receive support from those underlying support mechanisms; and (2) ETC designations and service areas are limited to those specific providers and geographic areas where such providers elect to receive support under one of the Commission’s universal service support mechanisms. In the alternative, the Commission should adopt rules, which would be binding on the states, that would achieve the same result. Or, as another alternative, the Commission should forbear on its own motion from applying section 214(e) to any carrier operating in a price cap carrier service territory in any geographic area where it does not elect to receive universal service support, and

²⁸ 47 U.S.C. § 214(e)(1).

²⁹ *Id.* § 214(e)(5).

thus ensure that such carrier is not subject to any existing or future ETC designation and service obligations for such areas.

All of these methods would ensure that an existing ETC's legacy designation(s) and service obligations will continue to apply only in those portions of their service areas, and for so long as that ETC elects to continue receiving support under the Commission's soon-to-be-phased-out legacy high-cost support mechanisms.

Issuing a Declaration or Adopting Rules. The Commission plainly has authority under section 201 to make a declaration tying ETC designations to the corresponding support mechanisms, such that the designation expires when the support sunsets, or to adopt rules that would achieve the same result. Any such approach made applicable to providers operating in price cap carrier service areas would be binding on the states – both with respect to existing ETC designations and any future ETC designations made by state commissions under section 214(e)(2).

While section 214 assigns the states a significant role in the ETC designation process, the Commission plainly has authority to interpret and adopt rules implementing section 214, and the states would be bound by that interpretation and those rules. As the Supreme Court made clear in *Iowa Utilities Board*, section 201(b) authorizes the Commission to adopt binding rules to guide the states' exercise of the duties allocated to them under Title II of the Act – including their authority to designate ETCs under section 214(e).³⁰ Moreover, the courts' deference to the Commission would be especially strong in this context because section 254 grants the Commission broad authority to implement the entire federal universal service program, of which ETC designations form only a small part. The Commission recognized as much in the *Western*

³⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999).

Wireless Order, noting that, in designating ETCs under section 214(e), state commissions may not adopt policies or eligibility criteria that thwart federal universal service goals, and that to conclude otherwise would “effectively undermine[] congressional intent in adopting the universal service provisions of section 254.”³¹

Section 254 also authorizes the Commission to make a declaration or to adopt rules extinguishing states’ current, and limiting their future, ETC designations. As noted above, in 1997, the Commission agreed with the Joint Board that establishing excessively large ETC service areas could violate section 254(f) by undermining the Commission’s policies designed to preserve and advance universal service.³² That section prohibits states from adopting universal service policies that are “inconsistent with the Commission’s rules to preserve and advance universal service.”³³ Maintaining existing ETC service area designations, or adopting new ETC service area designations, for providers operating in price cap carrier service areas that go

³¹ *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168, ¶ 29 (2000) (*Western Wireless Declaratory Ruling*) (“While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements.... [W]e do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers. To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.”).

³² See *First Universal Service Order* at ¶¶ 184-85. See also *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶¶ 176-77 (1996) (noting that excessively large ETC service areas “could potentially violate section 254(f)” by undermining the Commission’s efforts to preserve and advance universal service); *Federal-State Joint Board on Universal Service, Western Wireless Declaratory Ruling* at ¶ 31 (relying on section 254(f) in preempting a state ETC requirement); *Lifeline and Link Up Reform and Modernization*, Notice of Proposed Rulemaking, 26 FCC Rcd 2770, ¶ 258 & n.458 (2011) (“[S]ection 254(f) . . . bars states from adopting regulations that are inconsistent with the rules established by the Commission to preserve and advance universal service.”).

³³ 47 U.S.C. § 254(f).

beyond the specific areas and providers receiving CAF Phase II funding would violate this prohibition.

In particular, such designations (and the unfunded ETC service obligations that accompany them) would hinder deployment of broadband by forcing legacy price cap carrier ETCs to devote limited capital resources to maintain rapidly obsolescing facilities and services to meet regulatory requirements that could be used to extend broadband to additional areas – contrary to Commission policies. They also would violate the principles on which the Commission’s universal service policies are based – including sufficiency and competitive neutrality. And they would contravene the requirement in section 254(d) that all providers contribute to universal service on an equitable and nondiscriminatory basis.³⁴ In particular, forcing legacy price cap carrier ETCs to serve high-cost areas without the support necessary to offset the costs of providing service there would hardly be equitable and nondiscriminatory.

Forbearance. In the alternative, the Commission could forbear on its own motion from applying section 214(e) to any carrier operating in a price cap carrier service territory in any geographic area where it does not elect to receive universal service support, and thus ensure that such carrier is not subject to any existing or future ETC designation and service obligations for such areas. Section 10 authorizes (and indeed requires) the Commission to “forbear from *applying any regulation or provision of this chapter [i.e., the Act] to a telecommunications carrier . . . or class of telecommunications carrier*” if it finds certain forbearance criteria are met.³⁵ Section 10 further prohibits a state commission from “*continu[ing] to apply or enforce any provision of this chapter* that the Commission has determined to forbear from applying under

³⁴ *Id.* § 254(d).

³⁵ *Id.* § 160(a) (emphasis added).

subsection (a) of this section.”³⁶ Both ETC designations and service obligations arise from section 214(e), which authorizes state commissions to designate carriers as ETCs³⁷ and provides that carriers so designated “shall, throughout the service area for which the designation is received . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c)[.]”³⁸ As a consequence, forbearance from applying that provision (*i.e.*, section 214(e)) to a particular carrier or class of carriers (such as any carrier operating in a price cap carrier service area that does not elect to receive support under one of the Commission’s universal service support mechanisms) would preclude such carrier(s) from being designated an ETC and subjecting them to any ETC obligations. Such forbearance plainly satisfies the statutory requirement that forbearance authority be limited to “telecommunications carriers” or “telecommunications services.”³⁹ By definition, all ETCs are telecommunications carriers, and all of the existing “supported” services are telecommunications services. In addition, the Act authorizes the Commission to tailor forbearance relief to “any or some of [telecommunications carriers’] geographic markets.”⁴⁰

There is ample precedent for this approach. In *TracFone* and many later orders, for example, the Commission has forbore from the requirement in section 214(e)(1) that an ETC must offer services using at least some of its own facilities.⁴¹ This statutory requirement appears

³⁶ *Id.* § 160(e) (emphasis added).

³⁷ *Id.* § 214(e)(2).

³⁸ *Id.* § 214(e)(1).

³⁹ *Id.* § 160.

⁴⁰ *Id.* § 160(a).

⁴¹ See, e.g., *Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Rcd 15095, ¶ 1 (2005).

in the same sentence as the requirement that ETCs offer supported services throughout their service areas, and there is no conceivable basis for concluding that the Commission could forbear from the former but not the latter. Forbearance here would also meet the Commission's mandate under section 706 of the 1996 Act to forbear from obligations that frustrate broadband deployment,⁴² as legacy ETC obligations do today with respect to price cap carriers.

The section 214 ETC designation functions that some states choose to exercise do not alter the forbearance analysis. A state commission's authority to designate a carrier as an ETC is wholly derived from section 214(e). Forbearance from applying that provision to a particular carrier (or class of carriers) in any geographic market where such carrier(s) does not elect to receive universal service support would remove such carrier(s) from the ambit of that provision, and thus, by operation of law, preclude such carrier(s) from being designated as an ETC. While such forbearance would limit the geographic areas in which a carrier may be designated an ETC, it would not curtail a state commission's authority granted by section 214(e)(2) to designate a carrier as an ETC.

III. Going Forward, the Commission Should Direct States to Create Support Mechanism-Specific ETC Designations.

Prospectively, the Commission should limit ETC designations (and their concomitant obligations) to the specific universal service support mechanism under which a provider elects to receive support. Limiting ETC designations and obligations in this manner is wholly consistent with section 214(e) of the statute, which, as discussed above, expressly ties ETC designations

⁴² See, e.g., *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009) ("As contemplated by § 706, the FCC has utilized forbearance from certain Title II regulations as one tool in its broadband strategy.").

and obligations to “universal service support mechanisms under section 254(c).”⁴³ Thus, for example, a state commission would review applications and grant separate CAF Phase II ETC designations and Mobility Fund Phase II ETC designations. Consistent with the Commission’s rules, each type of designation would have its own Commission-specified service obligations⁴⁴ and service term, at the conclusion of which the designation would sunset. Moreover, providers would file ETC applications conditioned on their receipt of federal high-cost support. In its *USF/ICC Transformation Order*, the Commission promoted the use of Mobility Fund Phase I ETC applications conditioned on the applicant prevailing at the reverse auction.⁴⁵ In the event the conditional Mobility Fund ETC was unsuccessful at auction, its ETC designation would be null and void.⁴⁶ Additionally, if successful, the winning bidder’s ETC designation would cover just the Mobility Fund Phase I funded locations (i.e., the areas covered by the conditional ETC’s winning bids).⁴⁷

⁴³ 47 U.S.C. § 214(e).

⁴⁴ It is important for the Commission, not state commissions, to establish the support mechanism-specific service obligations. Permitting states to impose state-specific obligations on CAF Phase II support recipients, for example, will chill participation in the program, thereby thwarting federal universal service goals. *See Western Wireless Declaratory Ruling* at ¶ 29.

⁴⁵ *USF/ICC Transformation Order* at n.665 (explaining that a provider may participate in the Mobility Fund Phase I auction if it “received its ETC designation conditioned only upon receiving Mobility Fund Phase I support”), ¶ 439.

⁴⁶ *See, e.g., Petitions for Designation as an Eligible Telecommunications Carrier for Purposes of Participation in Mobility Fund Phase I, Petition of T-Mobile for FCC Designation as an Eligible Telecommunications Carrier for Mobility Fund Phase I (Auction 901)*, WC Docket No. 09-197, WT Docket No.10-208, AU Docket No.12-25, 27 FCC Rcd 7247, ¶ 13 (2012) (stating that the conditional ETC designation will be effective only in those areas in which T-Mobile becomes authorized to receive Mobility Fund Phase I support).

⁴⁷ *See Connect America Fund*, WC Docket 10-90 et al., Second Report and Order, 27 FCC Rcd 7856, ¶ 1 (2012) (“Such conditional ETC designations . . . are also limited to the specific areas in which such ETC becomes authorized to receive Mobility Fund Phase I support.”). *See generally Mobility Fund Phase I ETC Forbearance Order*.

Not only should the Commission find that conditional ETC applications for specific support mechanisms (e.g., CAF Phase II and Mobility Fund Phase II) are consistent with section 214(e)(1), it should *direct* state commissions to grant only support-specific ETC designations conditioned on the provider electing to receive federal high-cost support. The Commission should find, as it did in its *Mobility Fund Phase I ETC Forbearance Order*, that designating providers in non-supported areas in price cap carrier service territories is inconsistent with its new “approach of targeting support to areas with a specific need for the support”⁴⁸ and its reinterpretation of section 214(e)(1).

As an administrative matter, the Commission could establish an orderly process by which an existing ETC could notify the regulatory entity that granted its initial ETC designation that it elects to convert its existing designation to a mechanism-specific designation (e.g., Lifeline-only designation or a conditional CAF Phase II ETC designation). If an ETC fails to make that election by a date certain, its legacy ETC designation would sunset in its entirety and the carrier would have to apply for any new mechanism-specific designation.

IV. *The Commission Should Delink Participation in Lifeline from High-Cost ETC Designations.*

At the time the Commission implements CAF Phase II, it should sever the link between participation in the Commission’s Lifeline program with the section 214(e) ETC designation for the Commission’s high-cost support mechanisms. The Commission joined the two through its rules in 1997, but Congress explicitly gave the Commission the authority *not* to do so in the 1996 Act. Specifically, section 254(j) of the Act states that that nothing in section 254 “shall affect”

⁴⁸ *Mobility Fund Phase I ETC Forbearance Order* at ¶ 16.

the Commission's preexisting Lifeline program.⁴⁹ USTelecom therefore urges the Commission to delink Lifeline from high-cost ETC designations by amending its rules to establish that both wireline and wireless carriers that elect to participate in the Lifeline program will do so as Lifeline-only providers.⁵⁰

Amending its Lifeline rules at the time it implements CAF Phase II is an important part of modernizing the ETC designation because there is no rationale for continuing to link the high-cost and lifeline programs in this manner. Lifeline customers have migrated in droves to services offered by wireless resellers that have voluntarily assumed Lifeline-only ETC status, and have no other high-cost ETC obligations. Indeed, the largest Lifeline providers today are these resellers and consumers increasingly prefer wireless to wireline Lifeline service. USAC data shows that Lifeline revenue has shifted from a mix of 7% wireless/93% wireline in 2007 to 80% wireless/20% wireline in 2013. Doubtless this trend is continuing.

Low-income consumers have expressed a preference for the wireless Lifeline option. And as a result, the number of Lifeline-only ETCs has grown dramatically in recent years. Virtually every area of the country now boasts multiple providers and traditional wireline high-cost ETCs are seeing their Lifeline subscriber counts plummet. These changes in the Lifeline marketplace lead to only one logical conclusion: Lifeline participation by wireline providers should be brought into parity with the Lifeline-only provider status accorded to the wireless carriers that now dominate this segment of the communications market. Finally, as a procedural matter, the Commission previously sought and received comment on proposals to delink Lifeline

⁴⁹ 47 U.S.C. § 254(j) ("Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program . . .").

⁵⁰ Of course, the Commission should expect that providers' Lifeline service areas may differ from their high-cost ETC service areas, if any, as low-income consumers obviously reside in non-high-cost areas.

from the ETC designation.⁵¹ It thus could amend its Lifeline rules, as recommended above, in its order adopting final CAF Phase II rules in compliance with its Administrative Procedure Act obligations.

⁵¹ *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, ¶¶ 502-04 (2012).